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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 613

O. L. SHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

E. T. MILLER,
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Of Counsel.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Reasons relied on for allowance of the writ	5
Brief in support of petition for writ of certiorari	11
Opinion of Courts below	11
Jurisdiction	11
Statement of the case	12
Specification of errors	12
Point I	14
Authorities	14
Summary statement and argument	14
Point II	21
Summary statement of facts	21
Authorities	27
Argument	28
Point III	39
Statement of facts	39
Authorities	41
Argument	41
Conclusion	44
Appendix "A"—Excerpt from Volume Sixteen, *Vernon's Annotated Revised Civil Statutes of Texas*	45

Table of Cases Cited

Braswell v. *United States*, 200 F. 2d 597	41, 42
Burke v. *Boulder Mill and Elevator Company*, 235 P. 574	28, 33
District of Columbia v. *Gallaher*, 124 U.S. 505	9, 28, 37
Fayerweather v. *Ritch*, 195 U.S. 276	5
Geyser Ice Company v. *Sharp*, 87 S.W. 2d 883	28, 35
Heidenheimer v. *Cleveland, et al.*, 17 S.W. 524	28, 38
Kansas Flour Mills Company v. *Board of Commissioners of Harper County*, 259 Pac. 795, 54 A.L.R. 1164	27, 28, 29

	Page
Kimbell Milling Company v. *Green*, 162 S.W. 2d 991, 170 S.W. 2d 191	28
Lotta v. *Transit Grain Company*, 222 S.W. 2d 467	28
McMillan v. *Wilson*, 121 S.W. 2d 1029	28, 35
Smith and Hayslip v. *Wilcox Oil Company*, 253 S.W. 641	28, 35
Stricklin v. *Rice*, 141 S.W. 2d 748	28, 32
Zeppa v. *Houston Oil Company*, 113 S.W. 2d 612	28, 35

STATUTES AND OTHER AUTHORITIES CITED

American Jurisprudence:	
Volume 6:	
Section 49, Page 211	27, 32
Section 50, Page 211	27
Section 52, Page 212	28, 32
Volume 12:	
Section 252, Page 795	27, 34
Revised Civil Statutes of Texas, Article 5645	5, 7, 8, 9, 14
United States Code, Title 15, Section 714m(c)	1, 2, 5, 14

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

Petitioner, O. L. Shannon, was tried and convicted in the United States District Court for the Northern District of Texas, Lubbock Division upon an indictment drawn under Section 15 (2) of the Commodity Credit Corporation Act,

Public Law 806, 80th Congress, 62 Stat. 1070, 15 U. S. C., par. 714 m (c) reading as follows:

> "Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both."

The indictment filed March 28, 1952 (Record p. 1) in this case contained 47 counts, six of which were dismissed by the court on motion of the Government. The jury found the defendant guilty on the others. The court, on January 9, 1953, sentenced him to five years imprisonment on each of counts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, and 46, to run concurrently as to those counts only. It also sentenced defendant to two years imprisonment on each of counts 24, 43 and 47, to run concurrently as to those counts, and ordered that the sentences on the first named 38 counts as a group and the sentences on the last three named counts as a group shall run separately and cumulatively and consecutively. The defendant was also fined $5,000 on each of counts 24, 43, and 47, but the execution of the sentences on said three counts was suspended and defendant was placed on probation for three years to commence after his liability under the above five year sentences on the 38 counts had been lawfully terminated and conditioned upon payment of the fines imposed within a specified period and his exercise of diligent and earnest efforts to make restitution to the Government within the earliest reasonable time. All of the counts charged that the defendant did willfully, knowingly, and unlawfully steal, conceal, remove, dispose of, and convert to his own use a

described commodity (wheat or grain sorghum) which was then and there the property of the Commodity Credit Corporation, hereinafter referred to as the C. C. C. In each count the time and place of the particular offense and the quantity of grain were stated.

An appeal from said judgment was taken by O. L. Shannon to the United States Court of Appeals for the Fifth Circuit, at New Orleans, which affirmed the judgment of the United States District Court.

The principal questions involved on said appeal were raised by Petitioner, Appellant below, as follows:

1. The *grain described in the indictment was the property of Appellant,* because under the "Uniform Grain Storage Agreement", which had been drawn by Commodity Credit Corporation and must be construed strictly as to it, such grain might be returned by Appellant upon demand or he might, at his option, pay its cash value at the nearest terminal market; and sale of the grain by Appellant could not be a willful theft or conversion. (Raised in trial court by Motion for Judgment of Acquittal, Record p. 506-7.)

2. That Appellant's option to return grain of like quantity and quality or pay its cash value *had been recognized and practiced by the parties to the contract* and that such contracts should be construed to mean *what the parties had interpreted it to mean* by their conduct and actions in dealing with each other under the contract. (Raised in trial court by Motion for Judgment of Acquittal, Record pp. 506-7.)

3. That, under the contract, Appellant was permitted to either return the same quantity and quality of grain that had been stored or to return any other merchantable grain and pay the difference in cash, and that under such a contract the stored grain was, as a matter of law, "the property of" Appellant; and his sale of such grain could not be a willful theft or conversion. (Raised in trial court by Motion for Judgment of Acquittal, Record pp. 506-507.)

4. That the contract in question, by way of further clarification, contained a specific provision designating the warehouseman as owner of the grain by requiring him, as such owner, to carry insurance on all stored grain *in his own name,* not as bailee or trustee for others, and requiring him to account for *the value* of all grain destroyed, regardless of the amount of insurance carried or collected by him; such provision thus conforming to the other provisions of the contract showing ownership of the grain to be in Appellant. (Raised in trial court by Motion for Judgment of Acquittal, Record p. 506.)

5. That regardless of the above described provisions of the contract, and the conduct of the parties by which they so interpreted the contract, *there could have been no intent to steal or convert the property in question as a matter of law because Shannon had the legal right to sell said grain to avoid further spoilage under Article* 5645, Revised Civil Statutes of Texas. (Raised in trial court by Evidence, Record pp. 181 to 230, and by Motion for Judgment of Acquittal, Record pp. 176 and 509-10.)

6. That the government totally failed to produce any physical inventory of Shannon's stocks or other tangible evidence of conversion of the grain described in the indictment. (Raised in trial court by Motion for Judgment of Acquittal, Record pp. 507-509.)

7. Prejudicial and material errors were committed by the prosecuting attorneys in argument of counsel on the trial of the case before a jury. (Raised in trial court by Motion for New Trial, Record p. 34, and by objections made during the Argument, Record pp. 513, 516, 521, and 550-51.)

All of these questions were decided and resolved against Petitioner O. L. Shannon by said United States Court of Appeals on January 15, 1954, and materially affected the determination of said appeal; except that said United States Court of Appeals did not discuss but ignored questions Nos. 2, 3, and 5, enumerated above, regardless of the fact that

said questions were supported with uncontroverted evidence and which evidence was never denied or claimed to be controverted by Respondent either in the record or in its Briefs.

Petitioner filed his "Appellant's Petition for Rehearing" in said United States Court of Appeals on January 27, 1954, and the same was by that Court overruled, without opinion, on February 3, 1954.

II

Reasons Relied On for Allowance of the Writ

1. The great importance of the statute (15 U. S. C. A. par. 714 m (c),) as related to Section 34 of the Uniform Warehouse Receipts Act (Art. 5645, Revised Civil Statutes of Texas) in the light of the "Uniform Grain Storage Agreement" used throughout the United States by Commodity Credit Corporation, to the business world, public warehousemen, and the legal profession, and the need of an authoritative and elucidating decision, particularly as to the penal provisions of the Act.

2. The decision of the United States Court of Appeals in this case under a decision of the Supreme Court of the United States in the case of *Fayerweather* v. *Rich* (195 U. S. 276-277), should be reviewed by this court because, in this case, the United States Court of Appeals has deprived Petitioner of his rights under the "due process clause" of the 5th Amendment to the Constitution of the United States, by giving an unreasonable, untenable and unwarranted effect to Article 5645 of the Revised Civil Statutes of Texas, a local law, said statute reading as follows:

"Art. 5645. *Perishable or dangerous goods*

> "If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be

liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made upon the terms of this article shall be disposed of in the same way as the proceeds of sales made under the terms of Article 5644. Id. Sec. 34."

The uncontroverted, and undisputed, evidence was as follows: The records of United States Department of Agriculture licensed grain inspectors disclosed that 39.8% of all milo shipped by Petitioner during 1951, the period involved, was "musty" (Record pp. 414-415). All wheat shipped by Petitioner in 1951 was 65.6% musty (Record p. 414). Musty grain carries the grade of "sample" (Record p. 114) and "sample" grade is the lowest grade of grain (Record p. 113). The undisputed testimony is that when grain starts deteriorating in a particular warehouse, the whole of the stored grain *must be moved* or the spoilage will spread to all of the grain and destroy it (Record p. 111).

The witnesses Henry Stanley (Record p. 181), Charlie Steel (Record p. 186), Charlie H. Steel (Record p. 195), Gilbert Churchman (Record p. 207), Pete Thompson (Record p. 126), and Forrest D. Churchman (Record p. 226), all testified that the grain in Shannon's warehouses was rotting rapidly in 1951, just prior to the dates named in the indictment. They said the grain had completely rotted to a depth of from six inches to two feet in the bottoms of Shannon's

warehouses at that time. The grain-rot was rapidly spreading up from the floor to the top layers of grain. They testified that the warehouses were flooded on June 4, 1951, which made the situation worse.

Petitioner notified Commodity Credit Corporation of this condition by letter (Record p. 349). Mr. Stuart of Commodity Credit Corporation was personally present and actually saw the rotten condition of the grain (Record p. 278). The Government made no attempt to offer a single line of evidence to controvert the above described testimony. Nowhere have they contended they met it.

The refusal of the United States Court of Appeals to even consider or discuss the record thus presented constitutes an unwarranted, untenable and unreasonable disregard for the rights of Petitioner, (who was acting within the Texas Statute) under the due process clause of the 5th Amendment and is a sufficient ground for the exercise of its supervisory powers by the Supreme Court of the United States.

3. The United States Court of Appeals for the Fifth Circuit departed from the accepted and usual course of judicial proceedings, and sanctioned a like departure by the trial court, so as to call for an exercise of the power of supervision of the Supreme Court of the United States, in holding that the issue as to whether Shannon "willfully" converted the grain in question was properly submitted to the jury, *when that issue was a clear question of law only;* because under Article 5645 of the Revised Civil Statutes of Texas (quoted verbatim in 2 above) and the uncontroverted evidence of grain spoilage together with written notice thereof to Commodity Credit Corporation, the issue as to intent, that is, as to whether there was a "willful" conversion depended not upon any issue of fact (there being no dispute as to said facts) but entirely upon the construc-

tion and validity of said statute (said statute being identical with Section 34 of the Uniform Warehouse Receipts Act). The evident intent of this Petitioner to follow the provisions of said Article 5645 being uncontroverted, there could have been no intentional criminal conversion or theft of the spoiling grain disposed of by him.

The United States Court of Appeals departed quite radically from the accepted and usual procedure in disposing of the issue without fairly discussing or passing upon it. Such departure was very material in deciding the case.

4. The decision of the United States Court of Appeals in holding that Shannon "only held the grain in trust as bailee for the holders of the warehouse receipts" is a decision of a question of local law in a way probably in conflict with applicable local decisions.

5. The decision of said United States Court of Appeals in holding that Shannon "only held the grain in trust as bailee for the holders of the warehouse recipts" is an erroneous decision of an important question of general law and is in conflict with the weight of authority.

6. The decision of said United States Court of Appeals holding Shannon to be guilty of conversion and theft under the Commodity Credit Corporation Act, when, under the record, the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which permitted Shannon to either return the grain upon demand or pay for it at its cash value at the nearest terminal market is an erroneous decision of an important question of general law and is in conflict with the weight of authority.

7. The decision of said United States Court of Appeals holding Shannon to be guilty under said Act, when, under the contract of storage between Shannon and Commodity Credit Corporation, the parties, by their actions and con-

duct in dealing with each other thereunder, had interpreted the contract to mean that Shannon had the right to either return the grain in like quantity and quality or to pay its value in cash at the nearest terminal market, or return grains of lower quality and pay the difference in cash, is in conflict with the decision of the Supreme Court of the United States in the case of *District of Columbia* v. *Gallaher,* 124 U. S. 505.

8. The decision of said United States Court of Appeals holding Shannon to be guilty of conversion under the Act, when the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which, as fully admitted by government witnesses, permitted Shannon to either return the same quantity and quality of grain that had been stored or return any other grade of merchantable grain and pay the difference in cash, is an erroneous decision of a question of general law and is in conflict with the great weight of authority.

9. The decision of said United States Court of Appeals "that Appellant's claim that he had a right to sell the grain 'to prevent further spoilage' is a false issue," when the evidence is uncontroverted that he did that very thing under Article 5645 Revised Civil Statutes of Texas (Sec. 34, Uniform Warehouse Receipts Act), so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

10. The decision of the United States Court of Appeals overruling Shannon's contention that his Motion for New Trial should have been granted because of improper statements made by the United States Attorney and his assistant in their arguments to the jury, when said court admits in its decision that "These statements, strictly speaking, overstepped the bounds," so far departs from the usual

and accepted course of judicial proceedings, as to call for an exercise of this court's power of supervision.

III

Your Petitioner presents to this court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Court of Appeals for the Fifth Circuit.

IV

Petitioner further prays that, pending the disposition of his case by this court, he may be admitted to bail upon giving bond according to law in such sum as this court may deem proper, the bond to be approved by the Clerk of the United States Court of Appeals, for the Fifth Circuit, or otherwise as this court may direct.

WHEREFORE, Your Petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals had in the case numbered and entitled on its docket, No. 14,416, O. L. Shannon, Appellant, vs. United States of America, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of the said United States Court of Appeals be reversed by the court, and for such further relief as to this court may seem proper.

E. T. MILLER,
JAMES O. CADE,
Counsel for Petitioner.

KENNETH BOWLIN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 613

O. L. SHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of Courts Below

The opinion in the United States Court of Appeals for the Fifth Circuit has not, as of the date of preparation hereof, been published. Said opinion is found in the record of proceedings from said United States Court of Appeals and was rendered by that Court on January 15, 1954.

Jurisdiction

1. The date of the judgment to be reviewed is January 15, 1954. Petition for Rehearing was filed on January 27, 1954 and was overruled on February 3, 1954.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Title 28 U. S. C. 1254, Section 1; 62 Stat. 928.

3. The facts showing that the nature of the case and rulings of the court below are such as to bring this case within the jurisdictional provision relied upon, are recited above under Section II of the foregoing Petition for Writ of Certiorari, which is adopted and made a part hereof.

4. The cases believed to sustain said jurisdiction are as follows:

Warner v. *New Orleans,* 167 U. S. 467;
The Three Friends, 166 U. S. 1;
Forsyth v. *Hammond,* 166 U. S. 506;
Hiatt v. *Brown,* 339 U. S. 103;
Stack v. *Boyle,* 342 U. S. 1.

Statement of the Case

This has already been stated in the preceding petition under Section I, p. 1 et seq., which statement is hereby adopted and made a part of this brief.

Specification of Errors

I

The United States Court of Appeals erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when, under the record, the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which permitted Appellant to either return the grain upon demand or pay for it at its cash value at the nearest terminal market (Record, pp. 506-507).

II

The United States Court of Appeals erred in sustaining the trial court's action in overruling Appellant's Motion

for Judgment of Acquittal when, under the contract of storage between Appellant and Commodity Credit Corporation, the parties, by their actions and conduct in dealing with each other thereunder, had interpreted the contract to mean that Appellant had the right under the contract to either return the grain in like quantity and quality or to pay its value in cash as determined at the nearest terminal market, it being a well recognized rule of law that in construing a contract the interpretation placed upon that contract by the mutual consent and actions of the parties shall govern its construction (Record, pp. 506-507).

III

The United States Court of Appeals erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which permitted Appellant to either return the same quantity and quality of grain that had been stored or return any other grade of merchantable grain and pay the difference in cash. (Record, pp. 506-507.)

IV

The United States Court of Appeals erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal because regardless of the terms of the contract, and the conduct of the parties by which they interpreted the contract, under Article 5645, Revised Civil Statutes of Texas, there could have been no intent to steal or convert the property in question by selling it to prevent spoilage, as a matter of law. (Record, pp. 176 and 506-510.)

V

The United States Court of Appeals erred in sustaining the trial court's action in overruling Appellant's Motion

for New Trial which should have been granted because of the vindictive, prejudiced, false, and improper statements made by the United States Attorney and his assistants in their arguments to the jury, which statements were not supported by the record and were highly inflammatory and prejudicial to Appellant and influenced the jury to return its verdict of guilty. (Record, p. 36.)

Point 1.

Under Article 5645, Revised Civil Statutes of Texas, there could have been no intent to steal or convert the stored grain by selling or otherwise disposing of it to prevent further damage and spoilage. (Record pp. 176 and 506-510.)

Authorities

Article 5645, Revised Civil Statutes of Texas;
Title 15, Sec. 714 m (c) U. S. C.

Summary Statement and Argument

There is no showing of intent made out by the government in this case, as a matter of law. Under Title 15, Sec. 714 m (c) U. S. C., intent is an integral part of the offense. The government had the burden of proving that defendant "willfully" stole or converted the grain. It did not discharge that burden as we will show in this portion of our brief.

Again, we call attention to the fact that from the records of the licensed grain inspectors, 39.8% of all milo shipped during the period was "musty" (Record pp. 414-415). All wheat shipped in 1951 was 65.6% musty (Record p. 414). Musty grain carries the grade of sample (Record p. 114) and sample grade is the lowest grade of grain (Record p. 113). The undisputed testimony is that when grain starts deteriorating in a particular warehouse, the whole of the

stored grain must be moved or the spoilage will spread to all the grain and destroy it (Record p. 111).

The witness Henry Stanley (Record p. 181), Charlie Steel (Record p. 186), Charlie H. Steel (Record p. 195), Gilbert Churchman (Record p. 207), Pete Thompson (Record p. 216), and Farrell D. Churchman (Record p. 226) all testified that the grain in Shannon's warehouses was in bad condition in 1951, just prior to dates named in the indictment. They said that on the floor of the warehouses the grain had completely rotted to a depth of six inches to two feet. They further testified that the grain above this rotten bottom layer was deteriorating rapidly. They testified that the warehouses were flooded on June 4, 1951, which made the situation worse. Typical of their description of this grain was the testimony of Charlie Steel (Record pp. 188-189):

"Q. In terms of pounds, do you know how much rotten grain was in that warehouse?

"A. No, I wouldn't know just how much it was in there.

"Q. Did you help remove that rotten grain?

"A. Not out of that barn, no sir.

"Q. Did you help remove it out of another one?

"A. Yes, sir.

"Q. When was that?

"A. That was in May.

"Q. Well, how deep was it in that barn?

"A. In '51. Well, I would say it was, averaged, oh, around ten inches deep in that barn.

"Q. That was in May, that was before the flood; is that right?

"A. Yes, sir.

"Q. Did you ever in your time you were working out there, did you ever unload any warehouse, remove the grain from any of those warehouses where the grain was good all the way to the floor?

"A. No, sir.

"Q. What did you always find?

"A. Rotten grain on the bottom.

"Q. From what depth?

"A. I would say if a man would average the barns all up that I worked in, it would average around 12 inches deep."

After the flood on June 3rd or 4th, 1951, Henry Stanley (Record p. 182) says:

"Q. Did you work for him after the flood?

"A. Yes, sir.

"Q. All right. Now, what kind of work did you do out there after the date of June the 3rd, 1951, for Mr. Shannon? Where did you work?

"A. I helped move a little grain.

"Q. In the warehouses or where?

"A. Yes, sir.

"Q. Mr. Stanley, did you see, in moving that grain out of the warehouse, what did you find there at the bottom of the grain, when you got down to it?

"In barn D?

"Q. Wherever you worked there.

"A. There was grain from knee deep, from six inches to knee deep, just as black as it could be, rotten.

"Q. Was what?

"A. Grain knee, six inches deep to knee deep, black, rotten.

"Q. In the bottom of the barn?

"A. Yes, sir.

"Q. What did you do with that? What was done with that grain?

"A. It was left in the barn at that time.

"Q. Well, did you take it out?

"A. I don't know. It was in there when I quit.

"Q. You didn't help move it out?

"A. No, sir.

"Q. What shape was the grain in just before that knee-deep stuff?

"A. Well, it was damaged a whole lot.

"Q. Where was the good grain?

"A. Right on top.

"Q. Was there good grain on top?

"A. Yes, sir.
"Q. And then this badly damaged and then on the bottom what you call rotten grain?
"A. That's right.
"Q. And you say it was from six inches to knee deep?
"A. Yes, sir.
"Q. All over that barn?

"Mr. Binion:

"Did you say it was all over the barn or not?
"A. Yes.
"Q. Now, Mr. Stanley, could you turn the grain in that warehouse?
"A. No, sir.
"Q. Why couldn't you turn it?
"A. Didn't have no place to put it.
"Q. Did you have any facilities at all for turning it?
"A. No, sir.
"Q. If you had turned it, where would you have, what would you have had to have done with it?
"A. I don't know what you'd done with it.
"Q. Had to put it outside the barn?
"A. Yes, sir."

Shannon notified Commodity by letter as to this condition (Record p. 349). Mr. Stuart of Commodity Credit was present and actually saw the rotten condition of the grain (Record p. 278).

Mr. Shannon had to move this deteriorating grain immediately and get all of it out of the warehouses or it would have all rotted (Record p. 111). He was but following the Texas Law when he did move it out and sell it. Article 5645 of the Revised Civil Statutes of Texas reads as follows:

> "*If goods are of a perishable nature, or by keeping will deteriorate greatly in value,* or by their odor, leakage, inflammability, or explosive nature, *will be liable to injure other property,* the warehouseman may give such notice to the owner, or to the person in whose name the

goods are stored, *as is reasonable and possible* under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, *the warehouseman may sell the goods at public or private sale without advertising.* If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made upon the terms of this article shall be disposed of in the same way as the proceeds of sales made under the terms of Article 5644. Id. Sec. 34."

In view of the *uncontradicted and overwhelming evidence* in this record of deteriorated grain and the language of the above statute, how could there have been any criminal intent in the sale of these 41 cars of grain? Certainly the evidence of musty grain from the records of the Lubbock Grain Exchange and the Fort Worth Grain Exchange, of grades made by licensed grain inspectors mentioned above, is conclusive as to the bad condition of grain shipped in 1951 by Shannon (Record pp. 414-415 and 114).

The witness, John A. Bramlett, contracting officer for Commodity Credit Corporation, testified that he made the contracts for storage of grain *without any inspection whatever* of Shannon's storage plant and facilities (Record p. 65) and that all he knew about such facilities was Shannon's description of them in his application.

The Receiver, Thruston Bowers, testified (Record pp. 72 to 74) that the warehouses, where the grain had been stored, were dirt floors with a scattering of asphalt laid thereon. Bowers further testified that, in order to keep linters cotton he was storing in the warehouses from rotting, he used "dunnage" to hold the cotton up off of these dirt floors.

The government witness Charles C. Weaver, Jr., testified (Record p. 95) that there was no physical inventory of the

grains stored at the Shannon facilities at any time. The same witness admitted (Record p. 99-100) that, aside from an attempt to reconstruct an inventory from existing records, the only way to have determined the amount of grain on hand, on the dates named in the indictment was to have either weighed the grain or determined the cubic content of grain on hand and then reduce it to pounds. Neither of these methods were ever followed by Commodity Credit. Weaver finally stated (Record, bottom of p. 101), that he was not telling the jury how much grain Shannon had on hand on "any of these dates".

The government witness Bachmann made it clear that there had never been an inventory or check-up of grain stored with Shannon (Record pp. 171-172).

The government witness, N. K. Parrish, testified (Record p. 110) that he could not have slept at nights if he had grain stored in such warehouse facilities as those owned by Shannon. Parrish had been in the grain business ten to twelve years. (Record p. 107.)

Harry Hitch, another government witness, had been in the grain business 25 years. Mr. Hitch testifies (Record p. 123) that facilities such as Shannon was operating was not a proper place to store grain. He testified that he would place grain in such storage only "if I had to" and that he would leave it there no longer than he "had to". (Record p. 124.)

The witness, J. V. Boulden, a farmer who had stored milo in his granary built exactly as Shannon's warehouses were built during the same period of time involved here, testified that he stored 240,000 pounds of milo in the fall of 1950 and that it shrunk to a weight of 222,640 pounds by March 1951, a loss by shrinkage of 17,360 pounds (Record pp. 260-261).

Again, (Record pp. 350 to 352) Shannon told how he had notified Commodity on one occasion in 1950 that grain was going out of condition and they waited six weeks to give him

a loading order and a lot of it was further damaged in that period of waiting. Then he again testifies that, in 1951, he notified Commodity of the deteriorated condition and the peril of further damage.

Mr. Shannon was a Texas warehouseman and had a right to rely on Texas Warehouseman's Law as stated in the above Article 5645.

The grain was rotting in his warehouses, at least one representative of Commodity actually saw the condition, and Shannon wrote Commodity about it (Record p. 349). He had to move all of the grain quickly or it would all have rotted (Record pp. 110 and 124). He had a right to do exactly what he did do under Article 5645. He could not be a willful law violator when he was trying to follow the statute.

How can it be said that he did not give such notice "as is *reasonable and possible* under the circumstances"? If Commodity did not receive the letter that Shannon wrote, proof of that fact undoubtedly would be in the Record. It is not there. The burden was on the government and not on Shannon. There is not a line of evidence in the record to refute the evidence of deterioration and spoilage. Nor is there a line to refute the evidence of notice given by letter and in person.

How can there, as a matter of law, be a willful or intentional conversion or theft under such a situation of law and fact? There was no issue to go to the jury and the United States Court of Appeals found there was a jury issue without any basis, either in law or in fact; and in so doing departed from the usual and accepted course of judicial proceedings so as to call for exercise of supervisory power by this Court.

Point II

Where Petitioner owned grain stored in his warehouse, under a contract, as well as under the construction placed

upon said contract by all the parties including the depositor of the grain, Petitioner's sale of such grain could not be a willful conversion or theft.

Summary Statement of Facts under Point II

The *Uniform Grain Storage Agreement* under which Mr. Shannon accepted grain for storage from Commodity Credit Corporation is the sole basis for the government's case here. It was offered in evidence by the government. (Record p. 59.) We wish to particularly call certain provisions of that contract to the attention of the court (Government Exhibit 3, Supplemental Record).

Under Section 21 of the contract "the terms of this agreement * * * shall prevail over the written or printed terms of the warehouse receipts representing the grain." Under Section 6 of the contract "all the grain stored in the warehouse shall be deemed to be stored commingled with other grain", unless otherwise specifically authorized.

Section 11 clearly makes provision for settlements *on the basis of value* "if the warehouseman notifies Commodity that he cannot load out the uniform grade and quality called for by the loading order." Section 11 also provides that Commodity may reject shipments made to it, if they are not merchantable grain, that is if the grain is not acceptable.

We particularly call attention to paragraph 13 of the "Uniform Grain Storage Agreement", Government's Exhibit 3, which reads as follows:

> "13. Settlement for Load Out—(a) Settlement with respect to each individual warehouse for differences in value between the grain loaded out and the grain described on the warehouse receipts and accompanying documents or on the certificates provided for in section 9(b) shall be made in accordance with this section: Provided, That:
>
> (i) In the case of warehouses at locations where official weights and grades *are available,* Commodity

shall have the election to reject grain not meeting the applicable requirements of section 11, and the warehouseman shall not be given credit for loading out the quantity of grain rejected. *If the grain is rejected at destination, Commodity shall sell such grain for the account of the warehouseman unless the warehouseman has requested that rejected grain be held for his account.* Rejection at destination shall be on the basis of official grades at the loading warehouse location.

(ii) In the case of warehouses at locations where official weights and grades *are not available,* Commodity shall have the election to reject grain not meeting the applicable requirements of section 11, *but the warehouseman shall pay Commodity the value of the grain which should have been delivered rather than replacing such rejected grain. Commodity shall sell rejected grain for the account of the warehouseman unless the warehouseman has requested that rejected grain be held for his account.*

(b) Subject to the provisions of Section 11, *the warehouseman and Commodity shall make settlement with respect to each loading order for the difference between the value of the quantity and quality of the commingled grain which is loaded out by the warehouseman from locations where official weights and grades are available and which is accepted by Commodity, and the grain described on the warehouse receipts and accompanying documents* surrendered by Commodity or on the certificates provided for in section 9 (b), *on the basis of cash prices current in the applicable terminal market* as of the date of inspection of the final shipment under the applicable order to load out, except that the warehouseman shall not receive any credit for over-delivery in quality as between loading orders.

"(c) Subject to the provisions of Section 11, the warehouseman and Commodity shall make settlement for the difference between the value of the quantity and quality of the commingled grain which is loaded out by the warehouseman from locations where official

weights and grades *are not available* and which is accepted by Commodity, and the grain described on the warehouse receipts and accompanying documents surrendered by Commodity or on the certificates provided for in Section 9(b), *on the basis of cash prices current in the applicable terminal market as of the date the final shipment* under the applicable order to load out is accepted by the carrier; Provided, That, the warehouseman shall be allowed a quantity tolerance of ⅛ of one per cent on the gross loading weight of short weight cars with respect to which the official report of the condition of the car shows evidence of actual loss. The value of overdeliveries in quality of each kind of grain shall be applied against the value of underdeliveries in quality of the same kind of grain until all grain of each year's crop has been shipped, sold, or otherwise disposed of, or during such period of time as may be mutually agreed upon, *except that the value of any underdelivery in quality of grain delivered which is determined to be of sample grade shall not be eligible for offset.* The value of any overdelivery in quality not so offset in making settlement for the year's crop, or during such agreed period of time, whichever is applicable, shall be dropped."

This contract provision was interpreted by the Government witness Charles C. Weaver, Jr., on cross-examination (R. pp. 440-441), in the following language:

"Q. You are the same witness, same Weaver is what I wanted to get at. I believe a while ago you testified that during the year 1951 that 115 cars, sample grade, were shipped by Shannon to Commodity Credit; is that right?

"A. Yes, sir.

"Q. And I believe you testified that 40 of those were accepted; is that right?

"A. Yes, sir.

"Q. That means that 75 out of the 115 cars shipped were rejected, doesn't it, were not accepted?

"A. That's correct, although they were rejected.

"Q. When you testify there about certain cars being sold for account of Shannon, those cars are cars that have been rejected and they are down there drawing demurrage, and you just wire him and say that they are rejected and ask him whether you can sell them or whether he wants them; *and if he tells you to sell them, you sell them and apply the money against his account, isn't that right?*

"A. *Well, it's a little more than that.*

"Q. Well, why don't you tell us all about it?

"A. Well, I personally keep the books and don't handle these wires or telephone conversations. It's done in another division of our office, and the men are here. But the way it happens is that, as I understand it, is that the car is graded at the first inspection point, which is normally Lubbock, and the various arrangements are entered into with warehousemen relative to the handling of sample grade cars.

"Under the contract the first election as to acceptance or rejection of the cars is with Commodity Credit Corporation. The second election is with the warehouseman. He can elect to have the grain returned to him *or he can elect to have Commodity handle the grain for his account.*

"Now, *when he elects for us to handle the grain for his account, he is given credit for the quantity of grain as well as for the proceeds of the sale;* so it's more than just a monetary transaction.

"Q. You don't mean to tell us if he shipped a car of sample grade down there, say 75% total damage, and you sell that car of grain, say for nine hundred or a thousand dollars when normally it would bring two thousand or more, you don't mean to tell us that you would give him credit for a full 100,000-pound car of No. 2 yellow milo do you?

"A. Perhaps my statement was misleading. I meant that *as far as his liability to deliver additional grain would be concerned, he would be given full credit.* He's charged *for the difference in value.*

"Q. In other words, as provided in the contract, he's allowed to pay the difference in value; is that right,

between the grain delivered and that called for by the warehouse receipt, is that what you mean?

"A. No, sir.

"Q. Well, what do you mean?

"A. I mean that if he ships a car of grain, *we reduce his liability for the quantity of grain that he still has to deliver* by the weight of that car. Then *he is charged for the difference in the value between the value of the grain that was called for on the warehouse receipts and the net proceeds of the sale;* so it's a bookkeeping transaction or accounting transaction quantity-wise and monetary-wise or money-wise."

It is clear, from the above, that Shannon could ship sample grade grain under his contract, and, even though it were "rejected", he could then require Commodity to sell the so called "rejected" grain on the market and then allow him credit for the weight and volume of grain shipped; the only penalty to Shannon being that he was charged with and had to pay the *difference in value* between such sample grade and the grade called for by the warehouse receipts.

In their dealings with each other under this contract, Mr. Shannon and Commodity Credit Corporation also followed the very clear practice of permitting Shannon to deliver grain or at his option *to pay its cash value.*

The government witness, Pearlie M. Miller, testified (R. p. 140) that on "very small amounts" Shannon had paid cash to Commodity Credit all along for shortages in shipments of grain. He denied knowledge of larger payments and evaded direct replies to questions by saying that such matters would be handled by other departments. This is the old trick of "a wheel within a wheel" by which so many witnesses for the government evaded questions propounded to them in this case.

Willie Mae Rice, who had worked for Shannon as his bookkeeper and had continued to work for the Receiver for

several months, testified that on March 24, 1951 (R. p. 24, third paragraph), Shannon had paid Commodity Credit Corporation, by check (R. pp. 237-238) for 5,890,690 pounds of yellow milo. The check which was given for this grain was for $106,032.52 (R. p. 247). On March 29, 1951, Shannon paid Commodity Credit Corporation for 1,514,950 pounds of yellow milo (R. p. 245, second paragraph). The check given to Commodity for this last named grain was $27,269.01 (R. p. 247).

Mr. Shannon's uncontradicted testimony is that he paid Commodity cash for grain many times during the period of his various contracts with them. We quote Mr. Shannon (R. p. 276) as follows:

> "Q. All right. Now, on that No. 2 grain that you sold out there, where did you get that grain?
> "A. Well, I bought it from the farmers.
> "Q. Well, was there any that you bought from Commodity Credit?
> "A. Yes, sir.
> "Q. How many pounds of grain did you buy from Commodity?
> "A. About eight million pounds.
> "Q. You gave them a check for it?
> "A. Yes, sir.
> "Q. Is that check here among the records?
> "A. Yes, sir."

Later (Record p. 277-278), Shannon further testified as follows:

> "Q. Now, Mr. Shannon, and the other check for $27,000, is it among the records there?
> "A. Yes, sir.
> "Q. Did it come through and was it paid and charged to your account?
> "A. Yes, sir.
> "Q. Commodity Credit got that money?
> "A. Yes, sir.

"Q. Had you ever before bought grain from them back during the years?

"A. Yes, sir.

"Q. They knew you were in the grain business?

"A. Sure.

"Q. Did they ever ask you not to engage in the grain business while you were storing their grain?

"A. No, sir.

"Q. Did you think that under your contract you had a right to be in the grain business?

"A. I sure did.

"Q. And to sell your own grain?

"A. Yes, sir.

"Q. They ever protest to you about selling any of that grain in prior years?

"A. No, sir.

"Q. By the way, Mr. Shannon, from the time you started storing grain for Commodity Credit out there, did they ever during that whole period of time, did they ever send a man out there to check to find out how much grain you had in any of those warehouses or elevators?

"A. They didn't on milo. They did send a man out of the Kansas City office once to check to see how much sudan I had.

"Q. That was away back, was it?

"A. Well, that was since I have been in the storage business.

"Q. How far back was that?

"A. 1945, I believe, or '46; I am not sure.

"Q. Are you testifying that they hadn't checked you since 1945?

"A. They haven't checked me since 1945 for how much I had in storage."

Authorities under Point II

6 Am. Jur. 211, Sec. 49;
6 Am. Jur. 211, Sec. 50;
12 Am. Jur. 795, Sec. 252;
Kansas Flour Mills Company v. *Board of Commis-*

sioners of Harper County, 259 Pac. 795, 54 A.L.R. 1164;
6 Am. Jur. 212, Sec. 52;
Stricklin v. *Rice*, 141 S.W. 2d 748;
Kimbell Milling Co. v. *Greene*, 162 S.W. 2d 991; 170 S.W. 2d 191;
Lotta v. *Transit Grain Co.*, 222 S.W. 2d 467;
Burke v. *Boulder Mill & Elevator Co.*, 235 P. 574;
Smith & Hayslip v. *Wilcox Oil Co.*, 253 S.W. 641;
Geyser Ice Co. v. *Sharp*, 87 S.W. 2d 883;
Zeppa v. *Houston Oil Co.*, 113 S.W. 2d 612;
McMillin v. *Wilson*, 121 S.W. 2d 1029;
District of Columbia v. *Gallaher* (Supreme Court), 124 U.S. 505;
Heidenheimer v. *Cleveland, et al* (Supreme Court), 17 S.W. 524.

Argument under Point II

All American cases which deal with storage contracts wherein it is provided that *the warehouseman may return grain of like quantity and quality or deliver "any other merchantable grain and pay the difference in cash"* hold that a sale results and there is no bailment. Section 13 of the contract in question, quoted above, contains exactly that provision.

> "It is generally held to be a sale, and not a bailment, *if the depositor does not retain* the right to demand *the return of the grain deposited or the delivery of other grain of like grade*, and the warehouseman may return any merchantable grain, *though of other quality*, in such amount as will equal *the value* of the grain deposited, or in the same amount, *with payment for the difference in value*." 6 Am. Jur. 211, Sec. 50, and cited cases.

Not a line in the "Uniform Grain Storage Agreement" even remotely indicates that Commodity "retained the right to demand the return of the grain deposited or the

delivery of other grain of like grade." Quite the reverse is shown by allowances for delivery of "sample grade" or other low grades under the provisions of Sec. 13(c) and Sec. 13(b) which provide for settlements *at market value* for all shortages in either "quantity or quality". There was a shortage of quality, of course, when sample grade was delivered in lieu of No. 2 yellow milo.

This question was decided in *Kansas Flour Mills Company* v. *Board of Commissioners of Harper County*, 259 Pac. 795; 54 A.L.R. 1164. In that case the contract of storage reads as follows:

> "It is expressly agreed and understood that the Kansas Flour Mills Company may deliver any grade of merchantable wheat on the contract, providing that the Kansas Flour Mills Company pays to —— —— the market difference at Kansas City, Mo., *between the grade of wheat covered by this contract* and the *grade delivered* on the date delivery is demanded."

In its interpretation of this contract the Kansas Supreme Court said:

> "In the present action, there was not retained the right to elect to demand the return of the grain deposited or the delivery of other grain of like grade. The contract was to be satisfied by the return of *any merchantable* grain and *payment for difference in value.*
>
> Because the plaintiff had the right to return *any merchantable wheat and pay the difference in value, the possession of the wheat by the plaintiff was not that of a bailee; it was the owner of the wheat*, and the wheat was properly assessed as the property of the plaintiff, who must pay the tax thereon."

Under the *Uniform Grain Storage Agreement*, Government's Exhibit 3, O. L. Shannon could have discharged all of his contracted obligations by following the terms of Sec. 13(b) and 13(c) and settling with Commodity Credit

Corporation by paying cash "for the difference between *the value* of the *quantity* and *quality*" of the grain he loaded out, or delivered, and the quantity and quality of that called for by the warehouse receipts, computed "on the basis of cash prices current in the applicable terminal market". The very fact that his contract allows him to commingle the grain, make substitutions, ship lower grades, and make settlements for shortages in quantity and quality at the market price brings this case within the rules laid down in the above cited authorities.

The very reason for the specific language of this contract is that it is generally recognized that warehousemen engaged in this business are by reason of the nature of the business often unavoidably short on both quantity and quality and can, within reason, only be held liable for *its value*. The very hazardous nature of the business of storing and caring for highly perishable grain, and of commingling it in common warehouses with other stocks, and hazarding loss by deterioration, creates the obvious presumption that the warehouseman should have the right to sell or dispose of grain and buy other grain to protect himself and his depositors against these hazards. It is a severe penalty, in itself, that he should be civilly liable to the extent that he shall be required to settle at market value for stored grains *and make up for losses due to deterioration and shrinkage*. It would be impossible for him to operate and stay in business if he were forced to hold all of the grain at all times, regardless of deterioration.

It is undisputed that 39.8% of all milo shipped during the period was "musty". (Record pp. 414-415.) Wheat shipped in 1951 was 65.6% musty (Record p. 414.) Musty grain carries the grade of "sample" (Record p. 114). Sample grade is the lowest grade of grain (Record p. 113).

It is also undisputed that once grain starts deteriorating in a particular warehouse, the whole of the stored grain

must be "moved" or the spoilage will spread to all of the grain and destroy it (Record p. 111). Grain men of experience know these facts and the courts have recognized them in the above cited authorities. Not only that, the parties to this contract recognized these facts and so interpreted the contract in their dealings with each other as shown by the evidence above quoted as coming from government witnesses. The same authorities cited under the previous argument apply here to the effect that the interpretation placed upon the contract by the parties should govern the construction of that contract.

Mr. Weaver's testimony as quoted in the above statement shows conclusively that Shannon *had the election,* or option, to require Commodity Credit Corporation to sell sample grade grain on the market, when he shipped it to them, and credit him with the weight of grain shipped. In that event he was charged for the difference in value. This is Mr. Weaver, of Commodity Credit Corporation, who gives us this interpretation. We think his interpretation is consistent with the language of the contract. For this reason this contract comes within the rule laid down by the above cited authorities and there was no bailment. Therefore, Mr. Shannon was not guilty of conversion or theft, as a matter of law.

The United States Court of Appeals did not discuss the facts above referred to. The United States Court of Appeals ignored completely the authorities which have been cited here and which were cited in "Appellant's Brief" below. It is fundamental that any defendant, under our system, is entitled to a fair consideration of his case in the light of the true facts and the law.

"A particular transaction is regarded as a bailment if the depositor may require the warehouseman to account for grain deposited upon the basis of the original amount and quality, for this is consistent with the concept of storage,

but it is treated as a mutuum or sale *where the parties contemplate that the warehouseman may account for it on the basis of its value.*" 6 Am. Jur. 211, Sec. 49.

At 6 Am. Jur. 212, Sec. 52, we find the following language:

> "Where grain is delivered to a warehouseman, who mixes it with that of others, under an express contract, or a contract *implied from the usual course of business,* that when the depositor chooses to call for it the warehouseman will have the option to pay the market price or return an equal amount of grain of like quality, the general rule is that the transaction will not be deemed a bailment, but rather, a sale with an option on the part of the purchaser to pay either in money or in property as stipulated."

In connection with the above, footnote 20 on the same page contains a long list of supporting authorities. One of the cases cited is the Texas case of *Stricklin* v. *Rice,* 141 S.W. 2d 748. In the *Stricklin* case, which is apparently the leading case in Texas, Chief Justice Jackson of the Amarillo Court says:

> "However, *the law in Texas seems to be that when there exists no obligation to return the specific article and the bailee is authorized to return another article equally valuable the transaction is a sale and not a bailment. Keystone Pipe & Supply Co. of Texas* v. *Herbert Oil Corporation,* Tex. Civ. App., 62 S.W. 2d 606. The contract, among other things, expressly provides that the appellant may 'get sudan out of storage' when he is ready to sell, provided Manion Rice will not pay him as high a price as other grain dealers, which manifestly means if Rice refuses to pay the market price and Rice reserves the right to purchase the seed if he will pay as much as the other grain dealers, meaning obviously if he will pay the market price.
>
> *This is clearly a contract giving Manion Rice the option either to deliver the quantity and quality of*

seed deposited in the elevator by appellant or pay him the market price therefor."

The court then points out that the law distinguishes between a contract giving the depositor an option to demand the grain or to sell to the warehouseman and anyone he chooses and a contract giving the warehouseman an option. In this connection, the court then quotes from 6 Am. Jur. 212, para. 52, which we have quoted above.

The court then holds:

> "In our opinion, the written agreement gave Manion Rice the option to *return sudan seed of the same class or to pay the highest market price therefor and constituted a sale and not a bailment and therefore Rice was authorized to handle the seed as his own."*

In *Burke* v. *Boulder Milling & Elevator Company,* 77 Colo. 230, 235 P. 574, 575, the Supreme Court of Colorado says:

> "If the option to pay for grain at the market price or return the grain is with the warehouseman, the transaction is a sale. 3 R. C. L. p. 75, para, 6; Savage *v.* Salem Mills Co., 48 Or. 1, 85 P. 69, 10 Ann. Cas. 1065; Cloke *v.* Shafroth, 137 Ill. 393, 27 N. E. 702, 31 Am. St. Rep. 375; Barnes *v.* McCrea, 75 Iowa 267, 39 N. W. 392, 9 Am. St. Rep. 473; Bonnett *v.* Farmers' & Growers' S. Ass'n., 105 Kan. 121, 181 P. 634; Finch *v.* McClellan, 77 Ind. App. 533, 130 N. E. 13, 131 N. E. 236.
>
> "In each of these, and in practically every authority brought to our attention, the contract was for 'market price' or 'current price' or 'highest market price.' Whatever the language, the price is always definite or capable of being made definite. It is such a price, payable at the option of the dealer, which fixes upon the transaction the character of a sale."

The same principles announced in the *Stricklin* case and the Burke case have been followed in all of the Texas cases.

See the Supreme Court case of *Kimbell Milling Co.* v. *Greene,* 162 S. W. 2d 991, affirmed at 170 S. W. 2d 191, in which this same principle is approved, although the case turns on a different set of circumstances. See also *Lotta* v. *Transit Grain Co.,* 222 S. W. 2d 467, holding to the same effect as the *Stricklin case.*

The most favorable view of the contract from the Government's standpoint is that it is an ambiguous one as to the ownership of the grain in storage. The construction placed upon the contract by the parties as shown in the above statement of facts settles the matter for all time as a matter of law. The many small cash payments in lieu of grain together with the two large payments in March 1951, just prior to the dates named in the indictment, show without a chance for a doubt that both Shannon and Commodity interpreted the contract to mean that Shannon might either deliver the grain stored or, at his option, pay the cash value thereof. Not only does it show that he had the right to exercise such option, it shows that *Shannon did on many occasions exercise the option of paying cash instead of delivering grain and that Commodity consistently and over the entire period of the contract accepted cash payments in lieu of grain and recognized his right to exercise that option under the contract.*

The contract in this case was drawn and prescribed by the Government. It is labeled "Commodity Credit Corporation Form 25." (Supplemental Record.) It is the rule that a contract which is of doubtful meaning must be construed against the party who drafted it.

12 Am. Jur., p. 795, Sec. 252:

> "Doubtful language in contract should be interpreted most strongly against the party who uses it. A written agreement should, in case of doubt, be interpreted against the party who has drawn it."

This proposition of law is the law of Texas. In fact, it is so general and universal that it scarcely requires detailed citation of authorities.

The contract as written must also be construed in the light of the interpretation placed upon it by the parties themselves as we have stated above. This is particularly true where the contract is of doubtful meaning. The best aid in finding the intention of the parties *is to look to the construction the parties themselves have placed on their contract by their actions.* This rule has been laid down in many cases. *Smith & Hayslip* v. *Wilcox Oil Co., et al.*, (Tex. Civ. App. 1923) 253 S. W. 641; *Geyser Ice Co.* v. *Sharp* (Tex. Civ. App. 1935), 87 S. W. 2d 883; *Zeppa* v. *Houston Oil Co. of Texas* (Tex. Civ. App 1938), 113 S. W. 2d 612; *McMillin* v. *Wilson* (Tex. Civ. App. 1938), 121 S. W. 2d 1029. The Texas Court of Civil Appeals has said, in language which certainly does apply here:

> "The construction placed upon a contract by the parties themselves is entitled to great weight, if not of controlling influence, in ascertaining their understanding of its terms. It is said in 6 Ruling Case Law, P. 853, Sec. 241:
>
> " 'It is to be assumed that parties to a contract know best what was meant by its terms, and are the less liable to be mistaken as to its intention; that each party is alert to protect his own interest and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it to be.' " *Livingston Oil Corp.* v. *Waggoner* (Tex. Civ. App. 1925), 273 S. W. 903.

It is not necessary that the contract be "ambiguous" for the above rule to apply, where both parties adopt and accept a day by day interpretation of the contract with their eyes open and with full mutual consent and understanding

of what they are doing. Surely Shannon knew what he was doing when he wrote the checks in March 1951 for $27,269.01 and $106,032.52 and *Commodity knew what it was doing when it endorsed and cashed those checks.*

The testimony shows that on March 24, 1951, prior to the dates alleged in the indictment, Mr. Shannon gave Commodity Credit Corporation a check for $106,032.52 (R. 247). Later in the month on March 29 he gave Commodity Credit Corporation a check for $27,269.01 (R. 247). The record is not clear whether this was for grain which Shannon had previously sold or whether it was grain that he actually purchased from Commodity Credit stocks on the dates named in the checks. However, the United States attorney in his argument contended that these checks were given by Shannon in lieu of grain which had been stored with Shannon by Commodity Credit Corporation and for which Shannon was "short," his words (R. 552), being as follows:

> "Oh, they make a big to do about his purchasing grain from the Commodity Credit Corporation. What was he doing, gentlemen? *Just trying to make up some of his shortage that he had full knowledge of* it and had known about for a long, long time. That's all."

Under the United States attorney's theory, then, we have at least two instances where Shannon was permitted to exercise, in a large way, his option to pay the cash value of the grain instead of delivering it. In addition to this, Mr. Weaver, a government expert, testified that on many occasions Commodity accepted smaller amounts for differences in value when Mr. Shannon would elect to ship sample grade or other low grade grain in lieu of Number 2 Yellow Milo or good wheat (R. 441). All of which shows without doubt that the parties lived under and themselves interpreted the contract as being of the same type

and character described in the *Burke* and *Stricklin* cases, *supra.*

In this connection, however, should the court determine that the two large checks given by Shannon in March 1951 were for grain actually purchased by Shannon then, and on that date, that is that the checks were for grain then actually physically in storage; the acceptance of such checks for that purpose by the Commodity Credit Corporation *would none the less be a recognition of the right of Shannon under his contract to elect to pay cash for the grain,* or any part thereof, stored with him instead of redelivering it, and would constitute an interpretation of the contract by both parties to it as being a contract which gave such option to the warehouseman.

In the case of *District of Columbia* v. *Gallaher,* 124 U. S. 505, the Supreme Court of the United States passed on a situation involving a contract between the plaintiff in that case and the District of Columbia for the construction of a sewer system. There had been several radical departures from the requirements and specifications of the contract in the construction of the sewer line and the government of the District of Columbia for that reason had refused to pay a portion of the contract price. It seems that the work was actually performed under the supervision and with the consent of the District of Columbia engineer, both the engineer and the contractor being under the impression that they were following the contract. In passing on this situation, the Supreme Court of the United States held as follows:

> "The work as actually done under the direction and supervision of the District engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract, and to be paid for at the contract price. We think that *the practical construction which the parties*

> *put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract.''*

The Supreme Court of Texas has followed the Supreme Court of the United States in this rule. In the case of *Heidenheimer* v. *Cleveland et al.*, 17 S. W. 524 (Supreme Court 1891), the Texas Supreme Court holds as follows:

> ''But, upon the other hand, it is equally well settled that where the terms of the contract are uncertain, and its true intent and meaning doubtful, then the practical construction which the parties themselves put upon the contract by their conduct thereunder is of vast importance in ascertaining its true meaning, and 'may prevail over the literal meaning of the contract.' Authorities supra, and District of Columbia *v.* Gallaher, 124 U. S. 505; 8 Sup. Ct. Rep. 585.''

Citing other authorities in addition.

If we apply the same test in the case at bar, Shannon had the right to deliver either the stored grain or pay its cash value as he might elect, and as he had elected to do on many occasions *with the full approval and cooperation of Commodity Credit Corporation.*

Among others, this is one of the distinguishing differences between this case and the case of Herman Dawson v. U. S., 203 F. (2) 201, cited by the United States Court of Appeals in this case. In the Dawson case we find no such condition discussed either in Appellant's Brief nor in the Court's opinion. We assume that the question was not presented nor considered in the Dawson case. Unlike the Dawson case, this case clearly presents a situation *where both parties to the contract had interpreted such contract as giving Shannon the option to either re-deliver grain or to pay its cash value.*

That being true, Shannon was the owner of the grain described in the indictment under the authorities first above cited. Then, Shannon is not guilty, as a matter of law, as to any count of the indictment in this case.

There is no authority anywhere to support the decision of the Court of Appeals in this case, *if the true state of the record* in this case is recognized. The Court of Appeals could not have affirmed this case by any sort of maneuver had it quoted the above facts and excerpts from decisions in its opinion. Not the mere weight of authority, but all authorities are against the decision of the Court of Appeals in this case.

Point III

Vindictive, prejudiced, false, and improper statements made by the United States Attorney and his assistants in their arguments to the jury, which statements were not supported by the record and were highly inflammatory and prejudicial to Petitioner and influenced the jury to return its verdict of guilty, require reversal of the case in the usual and accepted course of judicial procedure.

Statement of Facts

During Argument of Counsel, Mr. Settle for the government speaking, the following transpired (Record p. 516):

> "The question before you, good or bad as to the parity law, did he steal the grain bought by his government, paid for by you? Were the taxpayers financing this construction? Were they financing his movie producing out there?
>
> "Mr. Cade:
>
> "We except to that remark, too, Your Honor, as being highly inflammatory, the remark he made by asking, is it paid by the taxpayer or is it paid for by you, gentlemen of the jury, as being highly inflammatory.

"The Court:

"I think you better cast your argument differently.

"Mr. Settle:

"All right."

It will be noted that the Court did not instruct the jury not to consider the statement so made by Mr. Settle. In fact, the Court infers that if the argument were cast differently it might be such as should be considered by the jury.

Again while Mr. Settle was speaking to the jury the following transpired (Record p. 521):

> "They have a bunch of character witnesses. Now, gentlemen, on character witnesses, some of them said he done a lot of business with them, but I submit, gentlemen, there is not hardly any gentleman that can't get some character witnesses.
>
> "Judas Iscariot had a very good reputation before he sold his Lord. Alger Hiss had some awful good character witnesses, some of the best.
>
> "Mr. Cade.
>
> "Now, if the Court please, we take a bill of exception to the remarks just made by counsel about Judas and Alger Hiss as being highly inflammatory and prejudicial.
>
> "The Court:
>
> "I will sustain the objection."

Again the Court fails to instruct the jury not to consider the improper Argument. We took a "bill of exception" to the remarks of Mr. Settle, which was not an objection at all—but a bill of exception. The Court might have cured our exception by specifically instructing the jury as to the impropriety of the argument, but he failed to do so.

Again, when Mr. Potter was speaking to the jury for the Government, the following transpired (Record pp. 550-551):

> "Now, the only question in this case is whether or not this defendant has done that. Oh, they harp a lot about criminal intent. Mr. Bowlin made the startling statement in his argument here that the government had to show a criminal intent on the part of Shannon at the time he stole this grain. Well, that's a little bit of an inconsistency, that statement, 'at the time he stole the grain'."

A careful reading of Mr. Bowlin's speech (Record p. 524 to p. 530) discloses that he made no such statement, nor anything resembling such a statement. The statement made by the United States attorney was deliberately misleading, false, prejudicial, biased and vindictive. Its effect on the jury could have been only an injurious one to this Appellant. Such a remark could not but appeal to bias, passion and prejudice. The Court of Appeals, in this case, stated that such statements "overstepped the bounds".

Authorities under Point III

Braswell v. United States, 200 F. 2d 597.

Argument under Point III

It is clear from the foregoing quotations and references to the Record that Petitioner was deprived of the right to a fair, unbiased and unprejudiced jury trial. The jury was inflamed by the unsupported, biased, impassioned and vindictive remarks made to them throughout the trial and particularly in the arguments by the prosecuting attorneys. The trial court did nothing to alleviate the effect of such remarks and in some of the instances above referred to, the Court only aggravated the evil by the comments he did make to the jury.

We think the law with reference to this sort of a situation was quite adequately stated in the case of Braswell v. United States, 200 F. 2d 597 in the following language:

> "The right to trial by jury comprehends a fair determination of the guilt or innocense of the accused, free from bias, passion or prejudice. See United States v. Haupt, 7 Cir., 136 F. 2d 661. And where error occurs which, within the range of a reasonable possiblity, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. See Little v. United States, 10 Cir., 73 F. 2d 861, 866, 96 A.L.R. 889; Cf. Kotteakos v. United States, 328 U. S. 750, 763-765, 66 St. Ct. 1239, 90 L. Ed. 1557.
>
> "As to the appellant Hoffman, the Government argues that under the decision in Christensen v. United States, 9 Cir., 16 F. 2d 29, he has no right to complain, since he initiated the violent acts by striking the United States Marshal after the Government had presented its case and rested. Ample power rested with the court to punish Hoffman for contempt, which was done. Denial of a fair trial is beyond the range of such punishment. It did not appear that Hoffman's violence was deliberately staged for the purpose of inducing a mistrial, nor did it appear that he was connected with the subsequent misconduct of other co-defendants. Even under the most trying circumstances, every needed power of the court must be exerted to guarantee and make effective a right of such transcendent importance as the right to a fair trial.
>
> "Further, *the comments of the court, while made with the best of intentions to prevent further prejudice of the defendants in the minds of the jury, actually expressed the court's belief that Hoffman and other unnamed defendants were under the influence of marihuana.* In a case where they were charged with unlawfully acquiring and obtaining marihuana, such comments were bound to be highly prejudicial. Jurors properly bear great respect for the Judge conducting

the trial, and his every word and act are calculated to have a strong influence upon them. Quercia v. United States, 289 U. S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321. See United States v. Levi, 7 Cir., 177 F. 2d 833. In entire fairness, the judge later certified, 'that there was no evidence that the defendant James Wade Braswell or Bobby Gene Grubbs, were under the influence of any drug whatsoever and the defendant, Bobby Lee Hoffman, was at all times during the trial and for several weeks prior thereto, in the custody of the United States Marshal.'

"While *counsel for the defendants did not specifically object to the comments of the court on the trial,* we think that they affected substantial rights of the defendants and that *it is the responsibility of this court to notice them.* Rule 52 (b), Federal Rules of Criminal Procedure; United States v. Ward, 3 Cir., 168 F. 2d 226, 228; Robertson v. United States, 84 U. S. App. D. C. 185, 171 F. 2d 345, 346. We think that none of these appellants have had that fair and impartial trial which is their constitutional right, and the judgment is therefore reversed."

For the reasons stated in the above case, the argument of government counsel alone should be sufficient reason to reverse this cause.

The United States Court of Appeals in its opinion holds that the remarks made by government counsel were improper. It then holds that these improper arguments were immaterial, all of which is a departure from normal judicial procedure. Such departure is so pronounced and definite in this and the other points above discussed as to constitute a complete denial to Petitioner of his right to a fair and impartial trial on the law and the facts of his case.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

E. T. Miller,
James O. Cade,
Counsel for Petitioner.

Kenneth Bowlin,
Of Counsel.

APPENDIX "A"

Excerpt from Vol. 16, Vernon's Annotated Revised Civil Statutes of Texas:

"Art. 5645. *Perishable or Dangerous Goods*

"If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made upon the terms of this article shall be disposed of in the same way as the proceeds of sales made under the terms of Article 5644. Id. sec. 34."

Historical Note

This article is identical with the provisions of section 34 of the Uniform Warehouse Receipts Act, see 3 Uniform Laws Annotated, except for the substitutions of "article" for "section", and "Article 5644" for "preceding section".